BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DON CAIN	)	
Claimant	)	
	)	
VS.	)	
	)	
RILEY CONSTRUCTION CO.	)	
Respondent	)	Docket No. 1,028,064
	)	
AND	)	
	)	
BUILDERS ASSOC. SELF INSURERS FUND	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the April 21, 2008[1] Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on July 23, 2008.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties confirmed that the claimant's average weekly wage was stipulated to be $807.60 and that there was no need to remand this matter to the ALJ in the event that the Board reverses the ALJ's decision and finds this claim compensable. The parties also agreed that claimant's date(s) of accident are a series from June 1, 2002 up to August 1, 2005, claimant's last date of work.[2]

---

[1] A Nunc Pro Tunc Award was entered on Apr. 23, 2008 to remove the language regarding future medical. Because the ALJ denied claimant's claim based on a failure to establish the statutorily required notice and written claim, claimant was not entitled to unauthorized medical.

[2] The Division's file contains numerous references to October 15, 2005 as the ending date of the series.

ISSUES

The ALJ found that the claimant did not meet with personal injury by accident and did not provide timely notice or timely written claim of any accident and therefore denied the claimant's request for compensation.

Claimant contends the ALJ's decision should be reversed. Claimant argues that he sustained a compensable injury to his low back on June 1, 2002 and continued to suffer injury while working each and every day thereafter (until August 1, 2005). Claimant also contends that he repeatedly told his employer of the problems he was having with his back beginning in 2002 and continuing up to the time he quit work in August 2005. And because respondent failed to file an accident report, his written claim on March 21, 2006 was filed within a year of his last date worked, August 1, 2005. Thus, he timely filed his written claim. Claimant also contends that he is permanently and totally disabled as evidenced by his testimony and the testimony of Dr. Lynn Curtis and Dick Santner.

Respondent argues that the Award should be affirmed in all respects. Respondent maintains that not only did claimant fail to give timely notice or file a timely written claim of his alleged work-related accident, but that all of claimant's low back complaints are attributable to an earlier injury dating back to 1985, when claimant was working for another employer.

At oral argument, the parties agreed that the issues to be resolved are: 1) whether claimant sustained a personal injury; 2) whether the injury arose out of and in the course of his employment with respondent; 3) whether timely notice of that accident was given; 4) whether there was timely written claim of the accident; 5) the nature and extent of claimant's impairment; and 6) claimant's entitlement of future medical benefits. No other issues were addressed and both parties specifically agreed that August 1, 2005 was the date of accident inasmuch as claimant was alleging a series of accidents and that date was the last day claimant worked for respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a work-related injury to his back in 1985 while working for another employer. A claim was filed and claimant was provided treatment. After that injury the claimant continued to receive periodic medical treatment for his low back primarily consisting of chiropractic care. There is no evidence in the file as to any permanency related to this accident.

In 1992, the claimant began working for respondent as a journeyman carpenter. On June 1, 2002, claimant was operating a backhoe when he twisted around to shut off the equipment and experienced a pinch in his back.[3] According to claimant he called his supervisor, Lonnie Pacquette, and told him that he was hurt and was going to see his doctor. Mr. Pacquette apparently agreed.

Claimant sought treatment from his own physician and after a period of conservative treatment, he had surgery in February of 2003 and was off work for 3 months. Respondent laid claimant off during this period so that he could receive unemployment. And in May 2003, claimant returned to work with restrictions.[4] By 2004, he was back performing his regular work duties.

Claimant testified that his back improved for awhile after this surgery but over time, it got worse. Claimant indicated that he would sometimes not work due to back pain. One time he recalls being in significant pain while working and when he complained to Mr. Pacquette, he was told to "suck it up."[5] He further testified that he recalls an instance in June or July of 2005 when he was moving concrete and he tripped, falling over a wheelbarrow. At the preliminary hearing claimant testified that he did not feel pain immediately.[6] But at the regular hearing claimant testified that his pain was immediate.[7] He maintains that he worked a couple of hours that day then went home. After about a month, claimant concluded he could no longer work and went to talk to Lonnie Pacquette.

On August 1, 2005, claimant met with Mr. Pacquette and advised that "he just couldn't do it anymore".[8] Mr. Pacquette laid him off and claimant received unemployment benefits for a period of time.

Claimant went back to see his own physician and eventually found his way to Dr. Amundson who recommended a variety of tests, including a discogram. Dr. Amundson referred claimant to Dr. Arnold who concluded that claimant was not a candidate for further surgery. Dr. Arnold released claimant on January 22, 2007.[9]

---

[3] R.H. Trans. at 10.

[4] *Id.* at 15.

[5] *Id.* at 18.

[6] P.H. Trans. at 15.

[7] R.H. Trans. at 38.

[8] *Id.* at 24.

[9] *Id.* at 32.

Claimant testified that his back pain has continued to get worse since 2005. He walks with a cane and is hoping to get retrained through some sort of state program. Claimant testified that he applied at "several hundred places" but has yet to find employment.[10]

On March 21, 2006, claimant filed his written claim and according to respondent, this is the first notice or writing that suggested claimant was making a work-related claim. Although claimant concedes that his first writing came on March 21, 2006, he maintains that he repeatedly complained to his employer that work was causing him back problems beginning on June 1, 2002 and continuing up until his last date of work. And while respondent and its employees admit that claimant complained of back pain, Lonnie Pacquette denies that claimant ever specifically notified him that his work activities were the source of his ongoing complaints.

When benefits were not volunteered, claimant scheduled a preliminary hearing. At that proceeding, many of the same issues present here were litigated, albeit based on limited evidence. The ALJ initially concluded that claimant had not suffered personal injury by accident, and that neither notice nor written claim were timely. On appeal, a Board Member affirmed the ALJ's finding that claimant had failed to file a timely written claim. That being determinative, no other issues were addressed.

Although his request for medical treatment was denied, claimant nevertheless continued to obtain medical treatment for his back complaints. Claimant first saw Dr. Amundson on October 17, 2005. Claimant attributed his low back and bilateral leg pain to an aggravation in mid-August 2005. He told Dr. Amundson that since his surgery in 2002, he had experienced some discomfort (which according to Dr. Amundson manifested itself at the L5-S1 distribution of pain) and intermittent stiffness.

The case continued to regular hearing. In addition to the parties' medical testimony, claimant offered additional testimony at the regular hearing as to his present condition and his efforts to provide notice to respondent. Respondent offered additional testimony from its owner, Lonnie Pacquette, and a co-worker, Emmett New. Both of these individuals testified that claimant continually complained about his back pain, and missed work periodically but Mr. Pacquette attributed claimant's troubles to his earlier low back injury working for another employer back in 1985. Neither individual recalled claimant telling them he was injured either in June of 2002 or in the summer of 2005, although both individuals admitted they knew of claimant tripping while pushing a wheelbarrow. But neither were aware of an injury resulting from that event.

Only one physician, Dr. Lynn Curtis, testified as to claimant's impairment. At the first exam, on March 22, 2006, claimant described an accident with a backhoe on June 1,

---

[10] *Id.* at 34.

2002. According to Dr. Curtis, this accident led to an L4 injury and subsequent laminectomy surgery on February 29, 2003. Dr. Curtis reviewed claimant's earlier test results including the MRI films and concluded that claimant bore a 28 percent permanent partial impairment.[11] When asked whether that impairment was caused by his accident, Dr. Curtis responded in the affirmative and explained that the June 1, 2002 accident as well as the reaggravation once he returned to work caused claimant's present impairment.[12] He recommended that claimant not work a full 8 hour day, but would not prohibit claimant from working some sort of part-time job. Based on the task analysis offered by Dick Santner, claimant had lost the ability to perform all of the tasks he previously performed, as a result of the 2002 injury and the subsequent aggravations.

Dr. Curtis saw claimant again on February 22, 2007 and increased his permanency to 32 percent and explained that claimant had worsened. When questioned about the cause of the worsening, (since claimant was no longer working) Dr. Curtis explained that claimant worsened either because of his activities of daily living, or the progression of the 2002 injury and aggravations thereafter. He determined it was the 2002 accident and claimant's work in the following year and a half, although he conceded that claimant's other activities could have been the cause. Interestingly, claimant apparently did not explain in any great detail the sort of work activities he was involved in because Dr. Curtis believed claimant was a heavy equipment operator when in fact, he was not although claimant was operating a backhoe when he was injured in June 2002. Dr. Curtis did not have a record of the event in the summer of 2005 involving the wheelbarrow where he tripped and fell.

The parties stipulated to an August 1, 2005 date of accident. It would appear from the facts that claimant may well have sustained an acute injury on June 1, 2002, and a series of aggravations thereafter. There is also a suggestion of another acute injury in June or July, 2005, just before claimant quit working. But because the parties stipulated to a series of accidents culminating on an August 1, 2005 accident date the Board will not disturb that finding. And any timeliness issues will be determined based upon that date.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[13] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[14]

---

[11] All ratings are to the body as a whole based on the 4th edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment.*

[12] Curtis Depo. at 12-13.

[13] K.S.A. 2005 Supp. 44-501(a).

[14] K.S.A. 2005 Supp. 44-508(g).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[15]

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[16]

Although respondent denied that claimant suffered personal injury arising out of and in the course of his employment, the source of these denials is the contention that claimant sustained a low back injury in 1985 while employed by another company and that his ongoing complaints were attributable to that accident rather than any new injury. That argument was accepted by the ALJ and formed, in part, the basis for the ALJ's decision to deny claimant's claim.

The Board has considered the record as a whole and finds the ALJ's findings on these issues should be reversed. Claimant testified that he injured himself on June 1, 2002 when he twisted to turn a key in some equipment. He also testified that he told Lonnie Pacquette of this event, although Mr. Pacquette denies this. Both parties agree that claimant periodically complained of his back after that time and even had surgery for his back complaints in February 2003. Although claimant returned to work in May 2003, he did so under restrictions, at least for a time. And Mr. Pacquette concedes that claimant missed work every now and again due to back pain and even had an incident where he tripped over a wheelbarrow which resulted in an increase in his symptoms. Shortly thereafter claimant quit work, explaining to respondent that he just could not "keep working".[17]

Taken as a whole, the Board is persuaded that claimant suffered a personal injury by accident while in respondent's employ. Although claimant may have suffered an injury

---

[15] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

[16] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[17] Pacquette Depo. (Feb. 25, 2008) at 7.

in 1985 while working for another company, he nevertheless was able to work for respondent from 1993 until 2002, as a journeyman carpenter without incident or the need for significant treatment. It may have been that his back was damaged as a result of that earlier accident, but there is no medical evidence within this record that supports respondent's assertion that the 1985 event is solely responsible for claimant's need for treatment, surgery and his ongoing complaints of pain. Accordingly, the Board finds that claimant did sustain personal injury arising out of and in the course of his employment with respondent.

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The ALJ concluded that claimant had failed to provide timely notice of his accident. The majority of the Board disagrees with the ALJ's conclusion. The parties have agreed that August 1, 2005 is the date of accident so notice must have been given before or within 10 days after that date unless just cause has been established. The Board has found that notice at any point during the series, even before the ultimate date of accident for a cumulative trauma injury will suffice.[18]

Here, claimant was performing rather heavy work and doing so on a daily basis over a period of years. He testified that he repeatedly told Mr. Pacquette of his back pain and Mr. Pacquette concedes that claimant would come to work but go home early due to his back complaints. Claimant also testified that he contacted Mr. Pacquette immediately after his June 1, 2002 event and also after he tripped over the wheelbarrow.

---

[18] *Stout v. Dolese Brothers Company*, No. 1,010,002, 2003 WL 22704175 (Kan. WCAB Oct. 29, 2003).

The purpose of the notice requirement is to put the employer on notice of an injury and give an opportunity to investigate.[19] Under these facts and circumstances, the majority concludes that claimant provided notice of his low back injury. Therefore, the ALJ's Award is reversed on this issue.

Turning now to written claim, the written claim statute, K.S.A. 44-520a(a), provides in part:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[20] The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.[21]

The only writing that claimant has argued satisfied the written claim statute is the document filed and served on March 21, 2006. This document was filed more than 200 days after August 1, 2005, the date of accident. This written document was, however, filed within one year of that date.

One member of the Board concluded that the claimant could not take advantage of the extended period of one year (afforded in the statute) based upon respondent's failure to file an accident report because although claimant complained about his back pain, he had not given notice of an accident. So respondent could not be compelled to file an accident report. As is often the case, those findings are preliminary in nature and subject to review by the entire Board upon a full presentation of the facts and circumstances.

Unlike the ALJ, the majority of the Board concludes that claimant did, in fact, provide timely written claim. Although claimant repeatedly complained of his back pain and missed work due to those complaints, respondent never filed a written accident report. Given

---

[19] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[20] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[21] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

claimant's type of work, his recitation of his back complaints, the need for surgery and subsequent restrictions, and his return to that same sort of work, the majority finds that respondent was placed on notice and should have filed an accident report. And that failure to do so extends the time in which claimant had to file his written claim. Accordingly, claimant provided a timely written claim by filing his E-1 with the Division on March 21, 2006.

Claimant asserts that he is permanently and totally disabled. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[22]

In *Wardlow*[23], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Only one physician spoke to the nature and extent of claimant's impairment, that being Dr. Curtis. He examined claimant on two separate occasions and offered a functional impairment rating of 32 percent based upon the range of motion model contained within the *Guides.* He also testified that claimant had lost the ability to perform 100 percent of the tasks he formerly performed in the past 15 years of his employment life.

---

[22] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[23] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

Moreover, he opined that claimant would be unable to work full-time, although he was not restricted from part-time work. Claimant had sought employment at "several hundred places"[24] but had been unsuccessful at obtaining employment, at least up until the time of the hearing. Based on this record the majority of the Board finds that claimant is permanently and totally disabled.

In light of the foregoing conclusions, claimant is entitled to future medical treatment for his work-related claims upon proper application to the Director.

Although claimant initially sought temporary total disability benefits, when this matter was tried before the ALJ the claimant did not itemize the dates he believed those benefits were due. At oral argument before the Board there was no further indication of the dates sought and in fact there was nothing within claimant's brief that might shed light on this aspect of his claim. For this reason, no temporary total disability benefits are ordered.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 21, 2008, is modified as follows:

The claimant is entitled to permanent total disability compensation at the rate of $467.00 per week not to exceed $125,000.00 for a permanent total general body disability.

As of August 29, 2008 there would be due and owing to the claimant 160.57 weeks of permanent total disability compensation at the rate of $467.00 per week in the sum of $74,986.19 for a total due and owing of $74,986.19, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $50,013.81 shall be paid at $467.00 per week until fully paid or until further order of the Director. Claimant is also entitled to future medical.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. The Board therefore approves the fee agreement on file.

[24] R.H. Trans. at 34.

IT IS SO ORDERED.

Dated this _____ day of August 2008.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

The undersigned respectfully dissent from the majority's opinion. We would find that claimant failed to give timely notice and failed to provide a timely written claim based on the same analysis set forth in the Board's earlier opinion. While the evidence clearly establishes that claimant consistently complained of back pain, he seemed to have given respondent the impression that those complaints were related to his earlier accident. And even claimant's own testimony makes it clear that he never asked for treatment, asked to fill out any paperwork, or made any effort whatsoever to assert a claim against this respondent until March 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge